Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 5 *Volume V*
Number 2 *Volume V Book 2*

Article 1

1995

The Changing Landscape of First Amendment Jurisprudence in Light of the Technological Advances in Media

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Panel I: The Changing Landscape Of First Amendment Jurisprudence In Light Of The Technological Advances In Media

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DR. PHELAN: We have a distinguished panel present, and I want to thank Dean Feerick for his very generous words to all of us.

We will begin with Dr. Schneider, who has terrific expertise in computers and telecommunications. He will be using a visual presentation to give us some grasp of what the technology is all about before we run off and make legal pronouncements about what it means.

So, Bob, without any delay, I would like you to start demonstrating to us what we are supposed to be talking about.

DR. SCHNEIDER: I would like to thank the organizers for letting me come to the symposium. The objective of my role in this panel is to describe the elements that comprise interactive communications.

This first excerpt that I am showing you on the screen appears

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from quotes from the Administration's Agenda for the National Information Infrastructure,[1] pulled off the Internet. Almost everything that I am going to show you today was pulled off the Internet within the last week or so, particularly, of course, the third item from the bottom, "Government must reform regulations in policy that may inadvertently hamper the development of interactive applications . . .,"[2] and so on.

What I want to do first is to present a brief history of the Information Superhighway, which you may have seen before. What is now the Information Superhighway was born in the 1960s under the sponsorship of the Advanced Research Projects Agency of the Department of Defense, which felt it important to establish high-speed communication between a small number of universities engaged in defense-related activity. I think there was a secondary role perceived there—that of security. In the event of war, there would be communications that were not dependent on the traditional types of telecommunications systems in place at that time.

By the 1980s the network had evolved into what is now called the Internet, which is still largely government/university-based and largely government supported. In the 1990s, of course, a revolution took place as the potential for education and commerce was recognized broadly. Various data communication service initiatives began to expand on others, some being distinct from the Internet. And I think what one now calls the Information Superhighway was born in the early nineties.

When the Internet was established, there were fundamentally two basic tools for examining, repeating, and exchanging data on the Internet. One tool, called Telnet, permits one to log on to a remote computer and execute commands on that remote computer.

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1. The Clinton Administration's plan, headed by Vice President Albert Gore, to create an electronic "counterpart" to the interstate highway system, linking a large number of interconnected networks in order to enhance the quality of life for U.S. citizens by providing services through the use of advanced telecommunications. *See* Thomas Surgue, *The Government's Role in the National Information Infrastructure*, 3 MEDIA L. & POL'Y 18 (1994); *see also The National Information Infrastructure: Agenda for Action*, 58 Fed. Reg. 49,025, 49,025-26 (1993).

2. This projection is reproduced *infra* App. A.

Here the user device is acting purely as a terminal but it has no particular occupational capability. The Telnet, for example, is the basis of the Orton Law Library Catalog System.[3]

The second fundamental facility developed was File Transfer Protocol ("FTP"), which has a lot more activity and permits one to exchange files. They built the ability to internally access and transfer files back and forth between computers.

Both utilities require a unique address to the target computer. This unique addressing of computer nodes is an important consideration, something that characterizes the Internet.

To access the Internet, one needs a network—some source of communication media. What kinds of media are there? Phone lines have become extremely popular for uses other than voice. Cable TV lines, of course, are used and have a potential for immense utilization in the communication area.

There are protocols which are pretty much the same in computers as they are in diplomacy—a set of rules for encapsulating data. The concept of an address is critical on the Internet. There are unique identification addresses for each end-user computer on the Internet in the form of a number of digits separated by periods or names.

Protocols are rules of formatting data. As I mentioned, for the Internet there is only one protocol, which is the internationally recognized TCP/IP.[4] TCP/IP is in essence the language that Internet machines speak.

What are the limitations of the Internet? Well, to some extent, the communication speed is a limitation. Interoperability[5] is another major problem. We had to divide by section department platforms, IBM specs, all signs, all sorts of machines, and all sorts

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3. *See* John W. Verity, *The Internet*, BUSINESS WEEK, Nov. 14, 1994, at 80.

4. "Transmission Control Protocol/Internet Protocol," the standard among communications languages on the Internet since the mid-1980s. *See* Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50, 52.

5. Interoperability is the ability to communicate between different computer platforms using various operating systems. CHARLES R. MCLURE, ET AL., LIBRARIES AND THE INTERNET/NREN 315 (1994).

of operating systems. Another limitation exists with respect to the issue of security, which is one that you will be addressing, I am sure, in tremendous detail.

Now, let me talk about the revolution and how we got here, because this year is different from last year in a really tangible way. We have to look at the developments in computing and the networking developments in the last fifteen years. What have personal computers ("PCs") done? They have become incredibly powerful devices with very sophisticated operating systems. Windows,[6] OS-2,[7] and Mac operating systems[8] are all very sophisticated and do a variety of things that the earlier PCs just weren't capable of doing.

Hard disks have become inexpensive, as has memory, so I now can buy immense power in a very small package and bring it home. Parallel to the hardware developments in personal computers were some very fascinating developments in the areas of maps, in which the conversion of images to a digital format was really explored and exploited. One can now buy inexpensively all kinds of devices so that a typical end-user at home can scan a full color photograph and convert it into the digital medium at relatively little expense. Compression techniques that evolved in the graphics area have now made the size of those files quite small. Those two pictures that I showed you require relatively small amounts of memory (30-40 kilobytes) in light of having been reproduced with pretty remarkable accuracy. So, development in the graphics area was critical because it enabled one to push pictures around the Internet with absolute facility.

Sound has undergone a similar transition. There are few of us that still maintain any kind of music collections at home on other

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6. A very popular graphical user interface ("GUI") for PCs distributed by the software giant Microsoft.

7. A GUI distributed by International Business Machines ("IBM"). *See* JOHN S. QUARTERMAN, THE MATRIX: COMPUTER NETWORKS AND CONFERENCING SYSTEMS WORLDWIDE 54 (1990).

8. The operating system which is built into all Macintosh computers manufactured by Apple Computer.

than digital format. I prize my old 33s,[9] but I don't listen to them anymore, because if they also run on a compact disc ("CD"), the records are probably almost not worth listening to. The revolution with sound is also a revolution about compression techniques.[10] Until now, pictures have been worth a thousand words, but it was also true that sound was worth a thousand pictures. To put a small amount of speech on a PC requires a tremendous amount of memory when you want to play it back. With compression techniques now, you can move speeches and things like that around very economically. It is not an engineering problem anymore, but a problem with economics in sound.

Modems came about which let us exploit the existing international network. The modem is a device that converts data into sounds, which then can be transmitted over existing international networks.

What else is going on? Well, it is always dangerous to say the revolution is complete. Wait until tomorrow; there might be some explosion on the front page of the *New York Times* that makes everything I have said obsolete. Let me describe two things that I think have had perhaps the greatest effects on the capabilities we have right now.

One was the concept of "hypertext," which was developed on the Mac platform, and allows links to data to be made on data themselves. For example, suppose our screen shows a sentence, "The quick brown fox jumped over the lazy dog," and the words "fox" and "dog" are highlighted in blue and underlined.[11] With the concept of hypertext, I move the cursor under the word "fox," I click it, and I will now automatically move to another file, perhaps on the same machine, which may show me a picture of a fox. It

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9. Thirty-three r.p.m. vinyl records, a recording format that has largely been superseded by the compact disc ("CD").

10. A technique that compresses a file to minimize the time required to send it to another computer. When received, the file must be decompressed to its original format to be used. *See* Donald R. Lockett, *Advancing Telecommunications Techniques for the 21st Century: Research Currents*, J. ADVERTISING RES., Mar. 1994, *available in* LEXIS, News Library, Curnws File. The projection is reproduced *infra* App. B.

11. This projection is reproduced *infra* App. C.

may show me a lot of history on a fox, it may be an entire dissertation or an encyclopedia article on the fox. It would work similarly for the word "dog." That concept of being able to use textual data as links to other textual data was an absolutely critical issue in what has evolved.

The computer folks have designed systems that made it basically unnecessary for end-users to worry about how something should be, how communications needed to be established, or where data reside. The Cuplan Hypertext Compliance Service allows even the most unsophisticated person total access to the basic computer world. The clients play a simple role; there are data links that just include information about the address of the location you want to go to and the tool that you need to get there. Telnet and a variety of other tools, the service, and the device to which one is going to basically check this, so the client has the capability of reading a graph or pie.

I think the best thing here might be an example, and I choose the following: Suppose our computer shows a sentence that says, "Go to the Cornell Law Library or to the Fordham Law Library."[12] I have chosen the Cornell Law Library because that law library has an entire World-Wide Web site.[13] If I put it on Fordham, I could have a demand that says, "Telnet to Fordham Law Library," and I would establish an automatic connection.

I would like to show you what kinds of information one can get at the next level. If I type the word "Cornell" and underline it, there is a phrase not visible to me on the screen, that doesn't show up on the screen, which says "HTTP,"[14] and then there is a whole string of symbols. What does that HTTP mean? It says, establish communications with computer, name WWW.Cornell,[15] which, I presume, is in Ithaca. Of course, it doesn't have to be; it could be in Tokyo. It then says, once you are there, find the file "intr.html,"

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12. This projection is reproduced *infra* App. D.

13. A World Wide Web site is a part of the Internet which links servers across the Internet. MCLURE, *supra* note 5, at 316-17.

14. HyperText Transfer Protocol links documents on the WWW. MCLURE, *supra* note 5, at 331-32 n.5.

15. WWW.Cornell is an example of an address.

the last string in that command I have written, and transfer that file to my computer and display it appropriately on my screen. That's what that HTTP command does. All I have done physically is type the word "Cornell" on the computer screen, and this kind of a process would occur without having to know where the computer is, or what I am going to get. Now, when I get something, that next file that I get may itself have text or images. It could be still, it could be moving, and it could have sound. For example, let me show you what you actually do get when you make that click to the Cornell Law Library. I know you can't read the small print here, but you can see that I get a basket in the midst of what I presume to be the building at Cornell that houses the Law School.[16] I then have a bunch of text, some of it in black and some of it in blue. The reason it is blue and underlined is another link to get to another site.

For example, there is one down here that says "the Contract with America."[17] You can see now that I have here an easy jump cite to an immense number of items, and this is only the first of two pages that I get. These are very broad categories. You can find everything from *The Stanford Law and Policy Review* to the White House World Wide Web server, which is a monstrous server on its own.

There are other network activities. Two of them are very popular, the first being e-mail,[18] which permits interpersonal communications. That is not an Internet activity.[19] It's an activity that has grown outside of the Internet, but it is certainly a critical subfunction of what is called the Information Superhighway. The other popular network activity is called Usenet News.[20] That allows

16. The projection is reproduced *infra* App. B.

17. Referring to the Contract With America, a set of proposed legislation advocated by the Republican Party.

18. Electronic mail, which allows you to send personal messages from one computer to another. JAMES MILLES, INTERNET HANDBOOK FOR LAW LIBRARIANS 7 (1993).

19. *See* projection reproduced *infra* App. E.

20. Unlike e-mail, which is directed at a particular person or group, Usenet news is undirected information—aimed at thousands of people around the world. For a detailed discussed of Usenet, see QUARTERMAN, *supra* note 7, at 235-50.

intergroup communication whereby any individual can go and look at Usenet News. I just pick a file and hit "enter" and I get an index of all 6,000 Newsgroups.[21] I pulled all those that had the word "law" or "legal" in them, and I found about twenty-four of them.

There are active bulletin boards in which all sorts of people anonymously log on and exchange information. It's kind of an intergroup communication, as opposed to the interpersonal communication that is represented by e-mail.

All of the Internet is not serious. There is also frivolity on the Internet. For example, there is a daily cartoon called "Dr. Plum." If one had access, he could set his computer so that every morning he sees the latest cartoon. I could go to a colleague of mine, who is an attorney, and link to a site called Andy's Favorite Lawyer Jokes.

Although it is not my role, I couldn't resist giving some of the legal background that applies to the Internet. I went back on the Internet, extracted the Magna Carta, and I looked at Provision 41, which provides that all merchants shall have safety and security in coming into England and going out of England, and staying in and traveling through England. If that isn't an anticipation of the Internet, I don't know what is.

I found some very "recent" legislation which is the subject of today's symposium. I maintain that the reference to religion, speech, and the press is something that we deal with in everyday life.[22] And the idea of speech plus press clearly anticipates what we now call multimedia.

I believe the intent of the Founding Fathers in the First Amendment was to preserve freedom absolutely. There is an amazing scope of legislation concerning freedom on what we call the

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21. Each Newsgroup is focused on a specific topic of discussion. QUARTERMAN, *supra* note 7, at 237.

22. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Internet and the Information Superhighway.

Also, I went in just to see how many current bills are pending that deal with the word "telecommunications." I got a list of fifty bills that are currently before either the House or the Senate that explicitly deal with telecommunications. It is obviously a hot issue, and that is why you are going to spend a lot of time today discussing it.

I want to emphasize what the Internet is. It is an international network of networks. I see it as registered computers to all nodes. They each have a unique address, and they share a common communications protocol, this thing I called TCP/IP early on.[23] Some of the computers are also gateways, which means that they permit connection to and from other networks that use other than TCP/IP protocol. Therefore, the Internet is part of the Information Superhighway, but it is not the entire Information Superhighway.

The Internet is not an Information Superhighway. It is not an organization, it is not an electronic mail system, and most of all, it is not home computers connected through America Online, Prodigy, CompuServe, or any other services. However, many of those services already do, and some soon will, provide indirect connections to what we have defined to be the Internet.

That is not to deny that there are an ever-increasing number of providers who now offer true Internet connections. The one in New York that is very popular is called Panix. It gives people what is basically a full Internet capability by assigning each user a temporary unique ID that permits them to use the Internet. There is still a requirement of the Internet that the end-user computers have an identifiable address.

Just so you understand how the Internet fits, here is a green circle. That kind of identifies what the Internet is, and then outside of it you see things like UUCP,[24] Fidonet,[25] BITNET,[26] the commercial

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23. *See supra* note 4.

24. Unix-to-Unix Copy. QUARTERMAN, *supra* note 7, at 251. UUCP access is often the most efficient method of sending and receiving e-mail, as well as reading Usenet News. *Id.* at 251-52. With a UUCP connection, the "client" machine (usually a PC) connects to a host "machine" to exchange files only. *Id.* at 251.

services, Delphi,[27] and so on. Those are outside of the Internet and therefore part of the Information Superhighway. There are links back and forth that exist, and they exist because the services have agreed to establish gateways into the Internet, and thereby extended the services of the Internet to a much larger end population.

I am going to end in a minute by asking four questions which I suspect will underlie a good part of the discussion for the rest of the day. First, who can establish nodes on the Information Superhighway?[28] I think today the answer is virtually anybody who has a computer and access to a communications medium, be it a phone or a fiber-optic link or anything in-between.

Second, what is on the nodes? Data and information are on the nodes. What forms can it take? It can take the form of text, (simple text, formatted text and hypertext), graphics, (either still or moving, from a video or other kinds of formatted motion picture type displays), and sound (in the form of speech and music). Nothing here is available only through the Information Superhighway. Everything here is available by routes other than the Information Superhighway.

If that's the case, then what has the Superhighway really added? What is new? I think what it has fundamentally accomplished has been to provide easier access to information than we have ever seen. You don't have to go to the library, you don't have to go to the movie theater, you don't have to go anywhere. You can sit home and be a couch potato and have the entire world's culture, art, and everything else brought directly into your home, in any manner you choose.

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25. A national organization of bulletin boards containing hundreds of areas. QUARTERMAN, *supra* note 7, at 254. The conferencing software is called echomail. *Id.* A message exchange service consisting of a network of computers that transfers messages. *Id.*

26. "Because It's Time" Network, a cooperative network serving 2300 hosts in 32 countries. QUARTERMAN, *supra* note 7, at 230.

27. Delphi is another commercial on-line service. Unlike other services, Delphi boasts full Internet access, including Telnet and FTP.

28. A node is "any vertex of a graph representing a network—that is, any machine on a network." QUARTERMAN, *supra* note 7, at 7. This projection is reproduced *infra* App. F.

It is also the beginning of a tremendously positive initiative, albeit one that can appear to be scary: real-time interactivity. You can now communicate back and forth instantly. Any of you who have used electronic mail have seen those people who answer the instant they receive a message. When you have to write a letter, the time scale between the stimulus and response is long enough, probably, to think it over. On the Internet, there is this tendency to see something that you don't like, or something that you do like, and respond instantly before you think the problem through. This real-time activity has an immense benefit or potential benefit, for example, on the education side, but it has social consequences that are, indeed, complex and must be treated carefully.

Another thing that is new is the whole concept of proprietary information.[29] Let's say you download a Kandinsky[30] print from the Internet. Is that a form different from the picture from which it was taken by a scanner, which in turn was probably done by a video of the original? In what form does your computer image reside, and who owns it?

In the Ansel Adams[31] photograph that I showed, all hardware information was under it. There was no instruction whether I could or could not download it. There was no prohibition to downloading it, so I downloaded it. I now have a print that is mine, because I downloaded it, but from whom did I extract it? Who owns it? There is a need to refine existing law with respect to the extraction of proprietary information from the Internet.

The last question is, who is or should be responsible for the contents and the management of those items that are out on the Information Superhighway? And to what extent does the computer owner provide them, if the computer user is not the owner?

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29. Dr. Schneider is referring to the problematic issue of ownership that arises due to the virtually unlimited ability to copy as well as use materials that are posted on the Internet.

30. A digital reproduction of a painting by Wassily Kandinsky, an important non-figurative painter and theorist.

31. A digital copy of a print of Ansel Adams, an important landscape photographer of the 20th century.

For example, there are approximately one thousand terminals available at Stony Brook that are owned by the University, whose end-users are students. Is the University responsible for what a student puts on those machines? Is a student responsible, or do the University and the students share the responsibility?

I am sure you will address all these questions effectively today. I thank you, very much.

DR. PHELAN: Thank you very much, Dr. Schneider. We can't let him get away without acknowledging that not only is he somebody who knows all about the Internet and the matrix beyond the Internet, but he is also somebody who has creatively used it for the benefit of society and his university. He was a board member, as well as a vice president of NYSER Net, which he had mentioned earlier, and in addition to that, he maintains all sorts of services on the Internet. His expertise is not merely passive but also active and we want to thank him for giving it to us.

We will now try to get from the very particular, all those trees that we just looked at, to some notions of the forest that involve questions of policy, questions of values, and, of course, legal questions, and then we will dovetail it further, sharpening it to a very specific legal case that will be talked about by our final speaker.

Let me take advantage of my position as moderator and throw out a few things to you. As a non-lawyer, I have always been impressed by the conservatism of the law, in the good sense of the term, in that any time a new technology comes along, and there is some conflict or dispute, lawyers and judges try to figure out how this new thing is like some old thing that already has rules, and argue over how we can extend and apply those rules to the new thing. The Internet presents quite a challenge to doing this.

The obvious example would be the mall. Where is First Amendment free speech exercised? At a town meeting or the town square? We have developed new types of town squares now, which are private property. Regarding the shopping mall, there has been a series of cases which gradually extended a new meaning to the obligations of private property to provide public space for dis-

cussion.[32]

Does that give us some sort of other leg up into this new space, this electronic space? Should there be a provision for a public sphere, even though it may be privately owned? If there is no provision for discussion, where are we going to meet, and how are we going to talk about anything, and how is the First Amendment going to be exercised in any way at all? That is just an example of how legal thinking and philosophical thinking merge in order to grapple with these problems.

In my field, the whole question of trying to understand what happens to us when a new type of communications technology grabs on to whatever we have to say to one another and show one another, goes under an arcane title called Orality-Literacy. There, a lot of studies have been done about what happened to society when we went from speech to writing,from writing to print, print to film and television, and of course, most recently, to the Internet itself.

I have just a couple of thoughts about that. Some years ago I finished a book about South Africa,[33] and somebody asked me to go to Washington to talk about it to people in Congress. I had finished the book maybe a year before I was asked to go down there, so I had forgotten most of the things that I put into that book. I thought nervously that these guys were going to think I was an expert on the subject, but a year had gone by and I didn't know what the hell was going on in South Africa, and that I would therefore make a fool of myself.

So, I went to my computer, this was in 1987, and I plugged into something called "Knowledge Index," which was a service of DIALOG.[34] It charged nothing over the actual usage cost of $25

32. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (the owner of a private mall could not entirely exclude speakers from engaging in expressive activity on his commercial property, because it is a quasi-public forum).

33. JOHN M. PHELAN, APARTHEID MEDIA: DISINFORMATION AND DISSENT IN SOUTH AFRICA (1987).

34. An informational retrieval service with access to many large databases. QUARTERMAN, *supra* note 7, at 610.

an hour for the time I was on it, but I found out that if I knew what I was doing I could get in and out of it in a matter of minutes and my bill was only $8 or $9 a month.

So, I went through Knowledge Index and pulled out all the things I thought were relevant about the media and apartheid in South Africa, printed it out, put it in my briefcase and went panting down to the airport and got to Washington. When I was sitting on the panel, there were two people who just flew in from South Africa, two editors of the *Weekly Mail*.[35] The director of the *New York Times* editorial page was also there. There were fairly heavy hitters, and certainly people that would be more knowledgeable than myself. To my surprise, I found out that they were unaware of information that I had picked off the Internet, though it wasn't called the Internet then.

It was a lesson I never forgot, that there is a terrific advantage to being plugged into this, and it really doesn't matter where you are. But that was then and this is now. Now I no longer have that service because I can't afford it. Dialog was bought by CompuServe. CompuServe offers that same service but at a terrific premium. So, if I want to get that information now it is less accessible to me, as a non-corporation, than it was eight years ago.

So, with all the developments going on, there may not necessarily be greater access. Maybe the technology provides greater access, but there are economic factors going on. There are big fights about ownership, fewer and fewer players own more and more, and they are going to make it harder for people to get in unless they are willing to pay a rate that can be set to whatever the market will bear.

Now I would like to introduce Steve Shapiro. Steve is the National Legal Director of the American Civil Liberties Union. His concern, of course, is primarily with individuals and their rights to express themselves and to have the ability to take advantage of this new technology. I am sure he has a lot to tell us about this.

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35. A South African Newspaper.

MR. SHAPIRO: Thank you very much. It is a real pleasure to be here this morning.

One of the advantages of being on the opening panel of a day-long symposium is that I have the luxury of raising a series of questions that other people can then spend the rest of the day trying to answer. That is a nice luxury to enjoy because the law in general, and constitutional law in particular, is still grappling with ways of dealing with this new phenomenon that we call the Information Superhighway.

One of the reasons the problem has been so vexing for constitutional lawyers and for courts is that there are two phenomena going on simultaneously. Both have important implications for the way that we send and receive information, and consequently, both have important implications for the way that we think about the First Amendment.

The first of these phenomena is the one that Dr. Phelan just described: that is, we are seeing a greater concentration of power over the distribution of information in fewer hands than ever before. We now have cable companies merging with phone companies,[36] and publishing companies talking to broadcast systems. In short, we are heading towards a world where in a very few years we are likely to see a small number of a very large multi-media corporations that will be gatekeepers to a huge amount of information. That prospect raises very serious questions about how society should respond to such a concentration of power over information in a relatively small number of corporate hands.

However, we also have this phenomenon that was just described to you as the Internet, which for the first time in history enables more people than ever before to be publishers and distributors of information and to reach a wider audience than would have been even conceivable a few years ago.

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36. *See* Panel III, *Cable Versus the Telephone Companies: Can Telephone Companies Be Constitutionally Barred From Delivering Video Programming?*, *in* Symposium, *First Amendment and the Media: Current Issues in Telecommunications Law and Cable Television*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 749 (1994).

At the same time, therefore, you have both the concentration of power over information and the dispersal of power over information. In other words, we are both shrinking and expanding our communications outlets. What the law is trying to do is to grapple with the meaning and significance of those two phenomena. The challenge, I believe, is to devise a system that is neither chaotic nor controlling, that tolerates neither private vigilantism nor corporate censorship, and that does not exacerbate the already troubling divide between those in society with access to information and those without.

Dr. Phelan was very charitable when he said that the law is conservative in the way that it treats these technological changes. It is certainly true that the way the law tries to understand technological development is through the process of analogy. That is the way we are taught as lawyers to reason. But it is also true that the law has been very slow over the years in appreciating the significance of technological changes and their impact on legal doctrine.

In 1915, for example, at the dawn of the motion picture era, the Supreme Court held that motion pictures are "not to be regarded . . . as part of the press of the country,"[37] largely because the Court did not quite understand this new technological development and did not quite know how to incorporate it into our traditional First Amendment thinking. Three decades later the Court took a very different view, noting that "moving pictures . . . are included in the press whose freedom is guaranteed by the First Amendment."[38]

Likewise, as most of you probably know, when the first telephone came along, the prevailing legal view was that wiretaps were not a violation of the Fourth Amendment because the Fourth Amendment protected people, not places.[39] Therefore, the Fourth Amendment did not cover the intangible transmission of your voice over the telephone line. It took many, many years before the Supreme Court came to grips with the fact that there were important privacy interests here that likewise had to be protected by the pri-

37. Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915).
38. United States v. Paramount Pictures, Inc. 334 U.S. 131, 166 (1948).
39. *See* Olmstead v. United States, 277 U.S. 438 (1928).

vacy protections of the Fourth Amendment.[40]

I think the courts are experiencing some of the same conservatism, some of the same ignorance, and some of the same head-in-the-sand qualities as they begin to grapple with the meaning of the Information Superhighway and its relationship to the First Amendment. Now, the very notion of phrasing the issue in terms of the constitutional or First Amendment implications of the Information Superhighway is a little misleading because the truth is that, beneath that phrase, there are a multiplicity of problems that may have a multiplicity of solutions. For that reason, it is useful to step back and disentangle some of those strands and approach the problems one by one. Accordingly, my goal this morning is to identify a series of issues that I believe merit further thought.

First, many of the most publicized controversies one reads about in the paper these days involve cyberspace. But the controversies involve cyberspace only tangentially, which is to say the dispute may have arisen on a computer network but the applicable constitutional rules are not significantly affected by that fact, at least not in my view.

For instance, you may have recently read in the *New York Times* the story of a University of Michigan student who was indicted for transmitting a computer message on a bulletin board dealing with violent sexual fantasies.[41] The government charged in its original indictment that the defendant's "fantasy" represented an unlawful threat because it allegedly referred to a specific female student at the University. The indictment raised several difficult legal issues, and was described by the *Times* as "the latest in a series of cases in which law-enforcement authorities in this country have tried to apply existing laws to the new and unchartered do-

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40. *See* Katz v. United States, 389 U.S. 347 (1967).

41. *See* Peter H. Lewis, *Writer Arrested After Sending Violent Fiction Over Internet*, N.Y. TIMES, Feb. 11, 1995, at 10. The government subsequently filed a superseding indictment based on five e-mail messages transmitted over the Internet to someone in Canada who apparently shared the defendant's fantasies. The superseding indictment, which no longer rested on the originally posted story, was discovered by a federal district judge on June 21, 1995. United States v. Baker, No. 95-80106 (E.D. Mich June 21, 1995).

main of computer networks, or cyberspace."[42] But, in fact, it strikes me that the critical question of whether the defendant's statement constituted an actionable threat or protected speech does not particularly turn on whether it was transmitted orally, in writing, or electronically.

The issue of what constitutes a threat and what is protected speech is a difficult First Amendment question, but I don't think it is any more difficult because this message was transmitted over an electronic bulletin board than it would have been if the identical message were mimeographed and distributed around the campus. The same is true for issues of sexual harassment. Last year, in another well-publicized incident, the Department of Education launched an investigation into charges that students at Santa Clara Junior College were using the school's computer network as a medium for sexual harassment.[43] Sexual harassment has proved to be an elusive term for the law to define.[44] Here, too, however, I don't think the fact that a particular message is distributed electronically rather than verbally significantly alters the applicable legal standard.

Second, the fact that the First Amendment does not protect computer threats or harassment any more than it protects more conventional threats or harassment does not mean that all existing laws can or should automatically be extended to the Information Superhighway. To the contrary, I think it is appropriate to be cautious in this regard, especially when dealing with criminal prosecutions.

This precise issue recently arose in a Massachusetts case where the Federal Government indicted an MIT student under the wire fraud statute[45] for creating an electronic bulletin board that was

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42. *Id.*

43. *See* Tamar Lewin, *Dispute Over Computer Messages: Free Speech or Sexual Harassment*, N. Y. TIMES, Sept. 22, 1994, at A1.

44. *See, e.g.*, Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993).

45. 18 U.S.C. § 1343 (1988 & Supp. V 1993).

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money of property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by

allegedly used by its subscribers to download copyrighted software without paying a royalty fee.[46] In dismissing the indictment, the judge did not condone the behavior, but he cautioned, "[i]t is not clear that making criminals of a large number of consumers of computer software is a result that even the software industry would consider desirable."[47] Similarly, in the case of the Michigan student referred to earlier,[48] I have no doubt that what the First Amendment regards as true threats can be prosecuted, whether they are transmitted by computer or otherwise.[49] What is far less clear is whether the government is warranted in applying a federal statute that prohibits threats sent across state lines, purely on the theory that the defendant's remarks were broadcast on an electronic bulletin board that could be downloaded anywhere in the world.

In fact, what happened in the Michigan case was really quite fascinating. The critical message was posted in Michigan. It was not originally received by the alleged victim, who was also in Michigan, but was downloaded by an alumnus of the University of Michigan who was in Russia at the time.[50] He saw that the message was coming from the University of Michigan and contacted the University, his alma mater. That set into motion a chain of events that began with the student's suspension and ultimately led to his indictment.[51]

But the theory that justifies federal jurisdiction, when both the defendant and the alleged victim of a threat were residing in the same state, seems to me very, very problematic. As with the application of the wire fraud statute in the MIT case, it is entirely reasonable to be skeptical about pouring this "new wine into an old

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means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned . . . .

Id.

46. United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1995).

47. *Id.* at 544.

48. *See supra* note 41 and accompanying text.

49. *See e.g.*, Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516, 2529 (1994) ("Clearly, threats . . . are proscribable under the First Amendment").

50. *See* Lewis, *supra* note 41.

51. *Id.*

bottle," as one judge put it,[52] and to insist that Congress carefully consider whether it can or should extend federal jurisdiction in this manner.

Third, the form of the medium does matter in other contexts, and so new First Amendment rules may have to be developed that take into account the unique characteristics of the Information Superhighway as well. Issues of obscenity become particularly troublesome on the Information Superhighway. I know there is going to be a panel devoted to these issues later in the day, but they are particularly troubling precisely because the governing standard relies on the notion of local community standards.[53]

The question inevitably then arises as to which community we are talking about when we have sexual messages that are transmitted over the Internet or over an electronic bulletin board. A conventional publisher can decide where to distribute his materials, and if the materials include sexual matter, he can avoid communities where the standards are less tolerant. By definition, materials that are distributed through cyberspace cannot be limited in the same way. Thus, in this context, there is a fundamental difference in the nature of the medium.

The federal government has claimed the right to download allegedly obscene material in any jurisdiction it chooses and then base its prosecution on that community's local standards. There was a case brought last year in Tennessee charging a California couple that had posted some material on a computer bulletin board in California with obscenity in Tennessee because a Federal postal inspector in Tennessee downloaded the material in that community. The defendants were then charged and convicted under Tennessee community standards. The case is now on appeal.[54] If the government's methods in this case receive judicial sanction, the inevitable

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52. United States v. LaMacchia, 871 F. Supp. 535, 536 (D. Mass. 1994) (Stearns, J.).

53. *See* Miller v. California, 413 U.S. 15, 24 (1973). Under this applicable Supreme Court test, the standard for determining whether speech is obscene depends partially upon local community standards. *Id.*

54. United States v. Thomas, No. 94-20019, (N.D. Tenn. Dec. 2, 1994) (judgment), *appeals docketed*, No. 94-6648 (Robert Thomas) and No. 94-6649 (Carleen Thomas) (6th Cir. Dec. 9, 1994).

result will be to reduce speech with sexual content on the Internet to the level of the least tolerant community.

Given the nature of the computer medium, it is far more consistent with the principles of the First Amendment to choose other alternatives. For instance, we can: (a) apply a national obscenity standard; (b) use the local standards in the community where the allegedly obscene message was posted; or (c) recognize a cyberspace "community" that is not geographically determined but instead consists of those people who choose to avail themselves of sexually explicit materials through on-line computer networks.

Fourth, while censorship by the government obviously presents the greatest threat to a system of free expression on the Information Superhighway, so far, there have been more incidents of censorship by the operators of on-line networks themselves.[55] And, unfortunately, the legal rules that apply in these situations are far less settled.

Should the major on-line networks be treated as common carriers, like the telephone companies, that are required to accept and transmit all messages and are correspondingly absolved of any liability for the messages they carry? Should they be treated as publishers, with full editorial control over the information they choose to disseminate and, if so, should they also then be held responsible if the material they disseminate is libelous, obscene or harassing? Or, should the networks be analogized to book stores, as some courts have done, which can exercise editorial control over the books they choose to distribute but which cannot be held liable for the contents of those books in the absence of actual knowledge?[56] The courts have not yet settled on the appropriate analogy to apply, nor have the networks themselves, and I am sure we will hear more about this from the next speaker, Mr. Zamansky.

For marketing purposes, some of the commercial providers have found it useful to emphasize their ability to screen the messages that they transmit. Hence, some providers have actively promoted

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55. Mr. Shapiro emphasizes the phrase "so far." The government is under increasing pressure to impose content restriction on the Internet. Two commonly discussed (but rarely defined) restrictions involve "indecency" and "terrorist speech."

56. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

themselves as family-oriented services. But as the number of lawsuits begins to increase, the on-line services are beginning to discover that such assertions of control are a double-edged sword that may increase their legal exposure while creating expectations that cannot be fulfilled.

Fifth, there are two competing First Amendment models for minimizing the risk of censorship in a world in which most people are likely to gain access to the Information Superhighway through some gatekeeper service. One is to increase the number of potential gatekeepers and then rely on the market to insure diversity. The second is to limit the censorship authority of the so-called gatekeepers, either by designating the Information Superhighway as a public forum, in which all speech is permissible, or by characterizing the on-line networks that serve as its gatekeepers as common carriers.

Unless and until the first option (increasing the number of gatekeepers) proves feasible, and I fear we may be heading in the other direction, the second option is preferable. Here, as elsewhere, we should be wary of providing a relatively few gatekeepers with too much authority to control the flow of information. The "delete" button is both too seductive and too crude a tool. Left to their own devices, many system operators will respond, I am afraid, as Carnegie Mellon University did when it chose to eliminate an entire bulletin board dealing with sexual issues because of a few posted messages that it deemed inappropriate.[57]

Sixth, any restriction on the so-called gatekeepers of the Information Superhighway, whether we are talking about Prodigy and CompuServe or the local cable company, ought to be designed to promote greater diversity in the marketplace of ideas and must rest on evidence, rather than speculation, that the regulations are necessary. Restrictions in an unregulated marketplace are more likely to stifle diversity than encourage it. Thus, it is imperative that the

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57. *See* John Schwartz, *Carnegie Mellon University Is Banning Sex-On Its Computer Network*, WASH. POST, Nov. 6, 1994, at A10. Carnegie Mellon University subsequently reversed its decision. *See* John Schwartz, *University Reverses On-line Ban: Sex-Oriented Network Won't Be Blocked*, WASH. POST, Nov. 9, 1994, at A13.

regulations will, in fact, accomplish the purpose they are designed to promote.

This is the lesson of last year's Supreme Court decision in *Turner Broadcasting Systems, Inc. v. FCC*,[58] which reviewed the constitutionality of the so-called "must-carry" rules, a part of the 1992 Cable Act[59] that requires all cable companies to carry the broadcast network signal, as part of their local franchise agreement.

The cable companies came into court and said, in effect: the government can't make us carry anything we don't want to carry; we are First Amendment speakers in our own right, like publishers of newspapers; if we choose to carry the broadcast networks, we are certainly free to do so, but if we choose not to, that is our choice as well; thus, any regulation that requires us to carry a speaker that we don't choose to carry is, in itself, a violation of the First Amendment.[60]

The Supreme Court rejected that First Amendment challenge by the cable companies, at least in its broadest form, in large measure for two reasons. First, it recognized that cable companies in most localities had the benefit of a government-conferred monopoly over an important communications service, and that one of the consequences of enjoying the benefits of a government-conferred monopoly is that cable companies might then be subject to regulations that could not be applied to other, more traditional, First Amendment speakers, like newspapers.[61] Second, the Court in *Turner Broadcasting* recognized the government's significant interest in insuring diversity over the airwaves.[62] The importance of insuring diversity over the traditional airwaves, i.e., what we get across our

58. 114 S. Ct. 2445 (1994).

59. Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-81 (1992) (codified at 47 U.S.C. §§ 534-535 (Supp. IV 1992)).

60. The cable companies rested their argument most heavily on the Supreme Court's decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), which held that the state could not require newspapers to publish the replies of political candidates who had been editorially criticized. *Turner Broadcasting*, 114 S. Ct. at 2460, 2464-65.

61. *Id.* at 2466.

62. *Id.* at 2470.

television screens, is no greater than the importance of insuring diversity across the Information Superhighway—what we get on our computer screens. *Turner Broadcasting* also holds, however, that the government cannot justify any regulatory scheme simply by invoking the goal of diversity. In a First Amendment context, the courts have an obligation to scrutinize that claim carefully.[63] Thus, *Turner Broadcasting* was remanded for further proceedings because of the failure of the lower courts to actually examine the record and determine whether the "must-carry" regulations were in fact necessary to insure diversity within the market.[64] The same healthy skepticism is appropriate when reviewing future attempts to regulate the Information Superhighway, even if those regulations are purportedly justified by the generally laudable goal of greater diversity.

Seventh, if we characterize the Information Superhighway as a public forum, then we need to be candid about the fact that many users, including children, will be subject to unwanted messages as they cruise the Internet. Again, there are at least two available models for dealing with this problem. One is simply to regard it as an unfortunate, although unavoidable, cost of free expression to the system, just as all of us are subject to unwanted messages as we walk down the road. The second is to treat the Internet as we have treated the broadcast media and place limits on the messages that can be sent into the home.[65]

The technology to accomplish this already exists. For example, there is at least one major on-line service that has a software program designed to recognize and screen a pre-designated list of offensive words.

However, even when dealing with the broadcast medium, which traditionally has had the lowest level of First Amendment protection of any of the traditional media,[66] the courts have insisted that there be some "safe harbor" where adult subjects can be discussed

63. *Id.* at 2470-71.
64. *Id.* at 2472.
65. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (Stevens, J.).
66. *See e.g.*, Red Lion Broadcasting Co.v. FCC, 395 U.S. 367 (1969).

for adult audiences.[67] A software system that automatically deletes all offensive language and doesn't make it available at any time and any place, even for adults who may want to have access to it, raises significant constitutional issues that go beyond anything the Supreme Court has authorized in *FCC v. Pacifica Foundation*.[68] A regime that bans all offensive speech from the Information Superhighway not only reduces all adults to the level of children, it inevitably affects the content of permissible speech as well.

In a world in which there are no perfect solutions, if the choice is between broad censorship powers and being subject to the occasional unwanted message, my own personal preference is to continue to prefer that offended listeners hang up, or in this case log off, rather than giving system operators unregulated authority to purge any messages that they want to purge. Third-party censorship is also far less desirable than parental control (perhaps through the use of some sort of blocking mechanism).

One thing that is sure as we grapple with these problems is that the decisions that we make in the next few years will have consequences for decades. There are many difficult questions that need to be answered. In answering these questions, a good place to begin is where Justice Brandeis began fifty years ago when he said that the answer to speech is more speech, not enforced silence.[69] We should be especially careful to ensure that the Information Superhighway does not become a resource available only to the wealthy or to those who adhere to the intellectual orthodoxies of the day.

DR. PHELAN: Thank you very much, Steve. You can see that high-tech doesn't rule out high principles. He has been able to probe with a light touch and yet dig deep, so we are grateful to him for what he had to tell us this morning. I am sure there will be a question period later when other questions can be directed to both Steve and to our next speaker, Mr. Jacob Zamansky. Mr.

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67. *See, e.g.*, Action for Children's Television v. FCC, 852 F.2d 1332, 1342-43 (D.C. Cir. 1988) (Ginsburg, J.)

68. 438 U.S. 726 (1978).

69. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Zamansky is an attorney involved with a number of cases that deal with problems on the Internet. As I mentioned earlier, we are going from the more general to the more particular. Mr. Zamansky is involved in the *Stratton Oakmont v. Prodigy*[70] case which brings to the fore, in a very particular way, one of the many problems connected with the Internet.

Just let me throw out a couple of other ideas about these new forms and what they might do before we get to Mr. Zamansky's case. Software is transmitted by the Internet. But what is software? Is it content? It is something that should be protected and copyrighted? Or is software a device? Is it something that gets things done, that makes things happen? If it is, then it should be patented. Software is a completely different form of protection; it has a different time line. The cycle of innovation in software is getting into months now, yet the time for copyright or patent regulations and protections to take hold is significantly longer. But both copyright and patent law raise the question of attribution and responsibility. The law has developed all sorts of ways of guiding, regulating, recognizing, and channeling responsibility and attribution in communication and other affairs, but are they capable of keeping in step with the great speed of the Internet and the great anonymity of it?

Steven quite properly worries about the gatekeepers being a little too harsh. However, as somebody who wants to rely on the information that I get on the Internet, I would like to see gatekeepers be a little more strict about what they allow, and I want to be sure I can rely on the information I receive.

In any event, Mr. Zamansky will show us the issues of responsibility and attribution interacting on the Internet in a very intriguing case that he knows much about.

MR. ZAMANSKY: I want to thank the *Journal* for inviting me here to speak on the ground-breaking case that I filed just several months ago. I am used to arguing specific cases in front of

70. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

judges and juries, not dealing with mega-issues in front of an intellectual body like this, but, through my case, I am going to try and raise some very interesting questions. I understand there are professors here who have said this may appear in a final exam, so I am going to give the students a little bit of a heads-up. My brief to the court is in the papers that were distributed this morning. The following is my position on some of the ground-breaking issues that this case raises.

My case is *Stratton Oakmont v. Prodigy*,[71] which was filed just several months ago, but which has already attracted national attention in both the legal community and the technology community. It has been reported in the *Wall Street Journal*,[72] the *New York Times*,[73] and the *National Law Journal*,[74] among other papers. I have been labeled by some of these papers as the "lawyer in cyberspace" and the "on-line services' worst nightmare." And when you see what this case raises, you will see why I have been called these names.

The questions that arise out of the *Stratton* case involve issues that the other speakers have touched on. First, are there limits to free speech in cyberspace? If so, what are these limits? Do the libel laws apply to commercial computer bulletin boards? Is a commercial computer bulletin board such as Prodigy a "publisher," and like a newspaper, responsible for content, or are they more appropriately analogized to a telephone company that isn't responsible for any slander discussed on the telephone network?

What is the duty of care owed by a commercial bulletin board operator to subscribers and other people? And what problems are posed by anonymous postings on bulletin boards? These questions are raised in *Stratton* and, although I am going to suggest some answers, this is really a ground-breaking area that the courts are

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71. Edward A. Cavazos, *Litigation On-line: Cyber Issues Loom*, AMER. LAW., May 1995, at 54.

72. Viveca Novak, *Prodigy Lawsuit Expanded*, WALL ST. J., Jan 12, 1995, at B4.

73. Peter H. Lewis, *Libel Suit Against Prodigy Tests On-Line Speech Limits*, N. Y. TIMES, Nov. 16, 1994, at D1.

74. Robert B. Charles, *Computer Libel Questions in 'Stratton v. Prodigy'*, NAT'L L.J., Dec. 13, 1994, at 1.

going to be asked to decide. The case is pending in Supreme Court, Nassau County and, regardless of what the court decides, it is likely to go to the New York Court of Appeals.

As a framework for these questions, I want to cite what Justice Cardozo said many years ago in a different context. Cardozo said that when you have a new technology, and I think he was talking about the telephones at the time, the court should try and apply the existing law to the new technology, but if it doesn't fit, if it doesn't work, the courts are free to make new law to fit the new technology.[75] I believe that we can fit the existing libel law into this new technology of the Internet.

My client, Stratton Oakmont, is an investment banking firm. They make markets in stocks and take new companies public, particularly companies that are trying to raise cash for new products, many of which are in the high-tech area and biomedical fields. Stratton took a company public in October of 1994, on the Prodigy Network. Let me just first talk a little bit about Prodigy. Prodigy is one of the leading commercial computer bulletin boards in the United States. Its main competitors are CompuServe, America Online, and a number of the other computer companies, including Microsoft, that are trying to get into this very lucrative field. There is also a service called Genie. Through Prodigy or the other services, people around the country and around the world can communicate with other people on very specific subjects.

There are forums[76] for everything from wine-tasting to gardening or sewing. In my case there is a forum called "Money Talk" where stock brokers, investment professionals, traders, and potential investors discuss various stocks and various companies. I believe that there is a very special responsibility that a bulletin board operator has in a forum like Money Talk. If you think about the *Wall Street Journal*, or some of the insider trading cases that you might have read about, even the smallest bit of information in a forum like Money Talk can have a rippling effect on the price of a stock.

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75. BENJAMIN N. CARDOZO, THE NATURE OF THE LEGAL PROCESS 137 (1921) ("with new conditions there must be new rules").

76. Forums are areas on computer bulletin boards where specific topics are discussed.

In this case, after a certain message was posted, the stock dropped from 7 to 1 in a very short period of time.[77] Why? Because in this particular forum, participants include active traders in the market. If someone wished to "short" the stock of my client and manipulate the stock market, it could be done through Money Talk. In fact, this particular forum has attracted the attention of the securities regulators.

There has been a lot of discussion about misleading information and stock hyping on Money Talk. Before we go too far down the road with the Information Superhighway, someone has to establish some ground rules, and I believe this case is going to do it. I want to give you an analogy of what I see in this case.

If we have an Information Superhighway and Prodigy is the operator and owner of that highway, what is Prodigy's responsibility if somebody is drunk, swerving from side to side across that highway? Don't they have an obligation to pull that speeding and drunk driver off the highway to safeguard the rights of other people on the highway? That's the way I look at this case.

In *Stratton*, a sender, and I am going to use the name "David Lusby" in quotes, published on October 23 a message on Prodigy asserting that my client, Stratton, and its president, Daniel Pourish, committed "major criminal fraud" in connection with a new public offering. "Lusby" said that the SEC intended to shut down my client the following week. "Lusby" further asserted that Pourish is a soon-to-be convicted criminal, and that Stratton is a "cult of brokers who either lie for a living or get fired."[78] The poster claimed to be an attorney who was representing a number of shareholders who were going to sue my client. It seemed to me from the context of the message that he was looking for other shareholders to join the suit as plaintiffs. And again he signed his name "David Lusby."

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77. Arthur S. Hayes, *Computer Message Prompts Libel Suit*, WALL ST. J., March 26, 1993, at B12.

78. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

My client was outraged and came to me for advice as to what could be done. I tried to contact Prodigy but they weren't receptive—they didn't really want to talk to me. I had to take action quickly. The stock was dropping, and the reputation of my client, a successful banking firm, was being affected.

I sued for $200 million, claiming that Prodigy was the publisher of this message and was responsible for content on its bulletin board. I didn't even know who this "David Lusby" was. I finally found him in Key West, Florida so I went to court and requested expedited discovery. Usually in state court the defendant goes first. In this case, the judge granted the expedited discovery so I could try and find out who did this, what they were doing to my client, whether they were shorting my client's stocks, and the circumstances surrounding this libel action.

I am going to tell you the story that I was able to develop in depositions over the last two months, which are now the subject of my motion for partial summary judgment before the court. In Florida, David Lusby testified under oath that he did not do this. He testified that he was a former Prodigy software testing manager and had twenty to thirty employees working for him who used his internal test ID number, and that this number was issued to his employees. He doesn't know who did it, but it is likely that one of these twenty to thirty employees used his internal ID number to post this message on the board anonymously, using Lusby's name. To this day, we still don't know who actually posted this message.

I also took the depositions and got document discovery of Prodigy, and I found that Prodigy uses a marketing strategy in which it claims it is a family-oriented bulletin board. Furthermore, as a marketing strategy, Prodigy decides what goes on their system because a lot of users are children. As Prodigy is a joint venture of Sears and IBM, it wants to make sure that the content is appropriate for their users. In that regard, Prodigy has established content guidelines: there is to be no obscenity, there is to be no libel, no insulting matter, and nothing of a risqué nature.

There are instances where Prodigy has censored publications on their board. There was a dispute between homosexuals and Christian fundamentalists on one of the forums called "Health Spa."

They were disputing whether the homosexual lifestyle was a sinful lifestyle and Prodigy said, in effect, "Wait a second, we do not want this type of chatter on our board." They shut the forum down.[79]

Someone was posting anti-semitic remarks denying that the holocaust existed. The Anti-Defamation League of B'nai B'rith met with Prodigy and said, this is outrageous, you shouldn't be having these types of statements. Prodigy said they were right and issued a guideline saying they were not going to allow racial or ethnic slurs on the board and were going to have a standard that anything that is "grossly repugnant to community standards" will be deleted from the board.

Taking it a step further, Prodigy had raised their rates, they charged a per-message charge instead of a flat monthly fee. A number of users got on and complained about it. They got on Prodigy and said, "let's boycott Prodigy, it is not right for them to do this." Prodigy said that this type of conversation was not in their interest and they shut those people down.

These incidents occurred between 1990 and 1994, and there was a great uproar in the press accusing Prodigy of censorship.[80] Prodigy went to the *Wall Street Journal* and an article was published by their *own* Director of Communications who said, we have the right like a "publisher" or newspaper to decide what we want to have on our system.[81] We are not a common carrier, like a telephone company, and it is our decision that our users don't want this type of matter on the board, and this is our strategy to exercise editorial control.[82]

That's all well and good when you are talking about censorship and the First Amendment issues. But the flip side of it is libel. If

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79. *See* Edward V. DiLello, *Functional Equivalency and its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBLEMS 199, 207 & nn. 41-43 (1993).

80. *See, e.g.*, Paul B. Carroll, *Prodigy Protest Stirs Up Censorship Issue for Computer Fans*, WALL ST. J., Nov. 2, 1990, at B8; Peter H. Lewis, *No More 'Anything Goes': Cyberspace Gets Censors*, N.Y. TIMES, June 29, 1994, at A1.

81. Geoffrey E. Moore, *Letters to the Editor: Refusing to Publish is Not Censorship*, WALL ST. J., Dec. 14, 1990, at A19.

82. *Id.*

you are a "publisher," if you are exercising editorial control, you have made yourself into something that is like a newspaper or the broadcast media and which is responsible for content and can be sued for libel. That is a ground-breaking issue and I am asking the court to meet that issue head-on in my motion. Is Prodigy a "publisher"? I say, yes, by their own admissions in newspapers and through my depositions. I established that Prodigy has "editors" on each bulletin board. There is an editor named Chuck Epstein on Money Talk who sits there and polices the board to enforce Prodigy's content guidelines. Epstein, in his deposition, admitted that these notes that were posted about Stratton violated the guidelines and should have been removed.

So, I am asking the court to dispose of this key threshold issue: whether Prodigy is a publisher. I believe the answer is yes. If so, they are responsible for libel.

The other part of my case is another ground-breaking issue. What is the negligence standard for a bulletin board operator? I believe that Prodigy was grossly negligent in allowing an internal test ID number to be used by someone either inside or outside Prodigy, to post what I believe is libel per se.

I examined, under oath, Prodigy's head of security, and asked what procedures they had for issuance, central control, unique typing or retirement of test IDs. The security officer candidly admitted that they have no such procedures. It is just not something they thought about.

In this case, Mr. Lusby left the company in 1991. So, wouldn't it have been a prudent thing to do to retire his ID number when he left? The test group, the twenty to thirty people that he was working with, was disbanded in 1993. Maybe that's the time they should have eliminated these test ID numbers. Yet, it was still on the system in 1994, so that someone could use that number to libel my client. I believe that this was an accident waiting to happen which has focused attention on security issues.

Just to throw out a couple of other cases that I have learned about since I filed this lawsuit, people are making up ID numbers using other people's names. There is a little boy who is a boy

scout, and someone used his name to get an ID number and then used his name and ID number and threatened to kill somebody in his community. There are also people misusing IDs to fraudulently order products.[83] Prodigy has advertising in a home shopping network. Prodigy has to straighten out and tighten up its ID system, as do some of the other on-line services, because this raises the key issue of anonymity. If I am required to give my name, my address, and my credit card information to the on-line service, it is less likely that I am going to use the system to libel somebody, because there is accountability: they are going to find me.

There are tremendously sick things going on in the system. People are soliciting child sex on the network.[84] People are threatening to kill public figures. I think that if you are accountable, if they know who you are, if you are not allowed to use the system anonymously, that will be a great deterrent to the misuse of this system.

The case is going to be submitted to the Supreme Court in Nassau County on March 8, and hopefully there will be a decision later this year.[85] There will very likely be appeals regardless of the outcome. Perhaps next year's forum will be addressing some of the decisions that the courts have made in this key case.

To conclude, after studying this case and learning about Prodigy, I see that Cardozo was right, that when you have a new technology, try the old law and see if it fits in the new situation. I believe that it does. If not, the courts should welcome an opportunity to form new law for emerging technology. Thank you very much.

DR. PHELAN: I am dumping all my stock in Prodigy as soon as I get out of here. I am really very impressed. You can see where Mr. Zamansky gets his sterling reputation as a litigator; he is very sharp and to the point.

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83. For a more complete discussion of the potential for commercial fraud on the Internet, see *infra* Panel III (statement of Professor Norman Silber).

84. *See* discussion *infra* Panel II.

85. This case was decided on May 24, 1995. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

We have a kind of conflict here, between Mr. Zamansky's concerns that were raised by this case and Steven's concerns about freedom for the individual and a certain anonymity. I wonder if Steve would like to address some of those questions since the notion of gatekeepers having more control is raised by the case.

MR. SHAPIRO: I am not sure that there is a conflict. It seems to me that we are discussing what might be two different problems, or at least a problem at two different stages. The issue in this specific case is how Prodigy has marketed and presented itself, and what legal consequences that produces. That is presumably the subject of the motion that will be decided in State Supreme Court in Nassau.

The issue that I was addressing is really the next stage of the debate. The on-line systems have essentially been operating to date without any regulatory control by the government, either in the form of legal rules that develop through case law or in the form of legislation. And since I think we are inevitably heading toward a system of some regulation over the network, the question is what rules ought to govern those regulatory systems.

This case arises at a certain point in time, and it may be decided a certain way because it arises at a certain point in time. It does not necessarily follow that a finding in favor of Mr. Zamansky's client and against Prodigy in this case would necessarily determine the system that we are going to operate under forever after.

Let me make one other analogy. The Cable Act,[86] which regulates cable television, provides that while cable companies generally can exercise broad control over what is transmitted over the cable systems, there are limits to that control. For example, the "must-carry" rules that I described earlier. Also, there are limits on that control in the sense that cable companies are required to provide a certain number of what are known as public access stations that you all get on your televisions if you live in the City. These public access programs are basically public forums that are

86. Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at scattered sections of 47 U.S.C.).

available to people who want to appear on cable television on a first come, first served basis and are not subject to the censorship authorities of the cable company.

It may be that we will wind up with some sort of system over these commercial networks that looks like that, where there are parts of the network and parts of the system that really do represent the network's speech, if you will, and the network has control over what is spoken on those bulletin boards. The network correspondingly assumes liability for what is said over those networks. There may be at the same time a requirement that if we are going to have few gatekeepers, there has to be some bulletin board set up where everybody understands that they are not subject to control by the network, that they are available to people who want to speak outside that system of control, and that the network is correspondingly relieved of liability for what appears on those bulletin boards.

MR. ZAMANSKY: I did want to mention there is one court decision in this area which has driven a lot of legal commentary including an interesting article from the 1993 *Fordham Law Review*,[87] and I invite this Journal to comment on some of these issues, because one of the things I am doing in the absence of law is citing some of these law review articles, saying that the reasoning here makes a lot of sense, so that you may find the court following the *Fordham Law Review* article.

The case that I am referring to is called *Cubby, Inc. v. CompuServe, Inc.*,[88] a 1991 District Court opinion from the Southern District, Judge Leisure. In that case, there was a journalistic newsletter that was uploaded onto the forum called "Rumorville USA."[89] CompuServe had nothing to do with the editing of Rumorville. They just let them upload it. Rumorville said some derogatory statements. I believe they called a competing service a sham. And that service, called Skuttlebut, sued them and sued

87. Phillip H. Miller, *New Technology, Old Problem Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147 (1993).

88. 776 F. Supp. 135 (S.D.N.Y. 1991).

89. *Id.* at 137.

CompuServe.[90] The court dismissed the case against CompuServe,[91] saying that CompuServe did not exercise editorial control, that they are just like a book store and the book store can't be responsible for each and every book on its shelf.[92]

What I am saying is, that rule doesn't apply to Prodigy. Or, as I learned in law school, when the rule is not in your favor, create an exception.

So, I have asked the court to create an exception to the rule for Prodigy. Why? Because Prodigy does exercise editorial control. They have the editors who monitor for the content guidelines. They also have what Steve alluded to, the software screening.

The software screening originally had dirty words, certain words that begin with an "F" or an "S" automatically deleted, and the messages were returned to the sender. They expanded that in the ADL matter to include racial and ethic slurs.[93] For some of you who have used Westlaw, as with the Natural Language Search, you can actually put in a question to a computer and it gives you the cases.

I believe that they have the technology and the capability, with the help of a libel lawyer, to figure out what types of words or word patterns would come in your typical per se libel case.

One of the key things is calling somebody a criminal or a fraud: that is libel per se. You are damaging their reputation by making those accusations. I believe that you could use the software to screen for what are typically libelous statements. And, if anything, the editors should be alert on the board when they see this, particularly in a forum like Money Talk, where an untrue statement about a company can have a great influence on the price of the stock or that company's reputation.

So, I point you to the *CompuServe* case and watch out for the Prodigy exception to this case. I also suggest that this might be an

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90. *Id.* at 138.

91. *Id.* at 141.

92. *Id.* at 139-40 (citing Smith v. California, 361 U.S. 147, 152-53 (1959)).

93. *See* Michael W. Miller, *Prodigy Computer Bans Bias Notes From Bulletin Board*, WALL ST. J., Oct 24, 1991, at B1.

area that someone could write on and perhaps make new law through the *Journal.*

DR. PHELAN: Believe it or not, we have come to the end of our allotted time. I am sure that there are many questions that many of you would like to address to the speakers, but maybe we can do so in a more congenial atmosphere of coffee and buns.

I want to thank Steven. We can see why Columbia, Yale and many of the other law schools where Mr. Shapiro has taught are finally willing to share him with us. We have learned a lot from what he has to say. I am also absolutely stunned by how Prodigy is in big trouble by the very tight case that Mr. Zamansky has concerning the apparent abuse of their privileges on the Internet.

Thank you all.

APPENDIX A

THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION - EXECUTIVE SUMMARY

All Americans have a stake in the construction of an advanced National Information Infrastructure (NII), a seamless web ....

Promote private sector investment, through appropriate tax and regulatory policies....

Extend the concept to ensure that information resources are available to all at affordable prices...

Act as a catalyst to promote technological innovation and new applications.....

Promote seamless, interactive, user-driven operation of the NII.....

....government must reform regulations and policies that may inadvertently hamper the development of interactive applications.

Ensure information security and network reliability....

Protect intellectual property rights.....

APPENDIX B

THE EVOLUTION TO REVOLUTION ON THE INTERNET

RELEVANT COMPUTING / NETWORKING DEVELOPMENTS (1980's - PRESENT)

PERSONAL COMPUTERS

POWERFUL HARDWARE WITH SOPHISTICATED OPERATING SYSTEMS (WINDOWS, MAC, OS-2, ETC.)

GRAPHICS

DIGITAL IMAGES - STATIC OR MOVING
EXTRACTION (SCANNERS, VIDEO)
COMPRESSION TECHNIQUES
(a picture is worth 1,000 words?)

SOUND

TRANSITION TO DIGITAL SOUND
(a sound may be worth 1,000 pictures)

MODEMS

PHONE LINES FOR OTHER THAN VOICE
BROAD-BASED COMMUNICATIONS
USING EXISTING PHONE NETWORK

APPENDIX C

THE REVOLUTION IS COMPLETE (?)
HYPERTEXT, CLIENTS & SERVERS

HYPERTEXT:

DEVELOPED ON MAC PLATFORM
ALLOWS LINKS TO DATA TO BE BASED ON DATA THEMSELVES

e.g. The quick brown fox jumped over the lazy dog

CLIENTS / SERVERS

DESIGN A SYSTEM THAT MAKES IT UNNECESSARY FOR END USERS TO WORRY ABOUT WHERE DESIRED DATA RESIDE OR HOW COMMUNICATIONS NEED TO BE ESTABLISHED

CLIENT: Data links include address and tool information

SERVER: Client is capable of receiving and veiwing the file

APPENDIX D

Example:

Go to Cornell Law Library or Fordham Law library?

***Cornell* =**

http://www.law.cornell.edu/intr.html

***http* =**

1.) establish communications with the computer named www.law.cornell.edu (wherever it may be)

2.) find the file intr.html

3.) transfer the file to my computer and display it appropriately on my screen

The file may contain text, images (still or moving), sound, and will almost certainly contain links to other files on the same or different computers.

CORNELL LAW SCHOOL WWW PAGE

APPENDIX E

WHAT THE INTERNET IS NOT

THE INFORMATION SUPERHIGHWAY

AN ORGANIZATION

AN ELECTRONIC MAIL SYSTEM

HOME COMPUTERS CONNECTED THROUGH MODEMS TO MOST OF THE POPULAR COMMUNICATIONS SERVICES PROVIDERS (AOL®, PRODIGY®, COMPUSERVE®, ETC.) ALTHOUGH SUCH PROVIDERS MAY MAKE *INDIRECT* CONNECTIONS TO THE INTERNET AVAILABLE

[AN EVER INCREASING NUMBER OF PRIVATE COMPANIES NOW OFFER TRUE INTERNET CONNECTIONS. THESE COMPANIES (PROVIDERS) OWN OR LEASE COMMUNICATIONS LINES WHICH CONNECT TO THE INTERNET AT ONE OR MORE POINTS]

APPENDIX F

THE INFORMATION SUPERHIGHWAY

WHO CAN ESTABLISH NODES?

VIRTUALLY ANYONE WHO HAS A COMPUTER AND ACCESS TO A COMMUNICATIONS MEDIUM (FROM PHONES TO FIBER OPTICS)

WHAT IS ON THE NODES?

BASICALLY: DATA AND INFORMATION

- **TEXT**
  - SIMPLE
  - FORMATTED
  - HYPERTEXT
- **GRAPHICS**
  - PICTURES
  - "VIDEO"
- **SOUND**
  - SPEECH, MUSIC

ALL OF WHICH ARE AVAILABLE BY ROUTES OTHER THAN THE SUPERHIGHWAY